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TRANSCRIPT OF RECORD.

810

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1085~~. 738 ~~422~~ 97

CHARLES L. FICKLEN, AND CHARLES COOPER AND EDWARD M. COOPER, PARTNERS UNDER THE STYLE OF COOPER & COMPANY, PLAINTIFFS IN ERROR,

vs.

THE TAXING DISTRICT OF SHELBY COUNTY, TENNESSEE, AND ANDREW J. HARRIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

FILED SEPTEMBER 11, 1888.

Feby. 11, 1889 - to go back to docket

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1087.

CHARLES L. FICKLEN, AND CHARLES COOPER AND EDWARD M. COOPER, PARTNERS UNDER THE STYLE OF COOPER & COMPANY, PLAINTIFFS IN ERROR,

vs.

THE TAXING DISTRICT OF SHELBY COUNTY, TENNESSEE, AND ANDREW J. HARRIS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, DECEMBER 13, 1888.

a From the Supreme Court of Tennessee, at Jackson.

C. L. FICKLEN *et al.*
vs.
TAXING DIST. OF SHELBY CO. } # 1298, Shelby Ch'y Docket.

McDowell & McGowan, Craft and Craft, for compl't-; S. P. Walker, for defendant.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you, between Charles L. Ficklen and Charles and Edward M. Cooper, as partners under the style of Cooper & Company, plaintiffs, and The Taxing District of Shelby County, Tennessee, and Andrew J. Harris, defendants, a manifest error hath happened, to the great damage of the said plaintiffs, Charles L. Ficklen and Charles and Edward M. Cooper, partners as aforesaid, as by complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, 1888, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Samuel F. Miller, senior associate justice of the Supreme Court of the United States, and the seal of the United States circuit court, at Memphis, this 28th day of May, A. D. 1888, and 112th of American Independence.

{ Seal of the Circuit Court of the United States for the District of West Tennessee. }

J. B. CLOUGH, *Clerk.*

Allowed this May 28, 1888.
P. TURNEY,
Chief Justice of Supreme Court of the State of Tennessee.

2 [Endorsed:] Filed May. 29th, 1888. Jno. W. Buford, clerk, by Rob't Lindsey, D. C.

3 United States of America to The Taxing District of Shelby Co., Tenn., and Andrew J. Harris, Greeting:

You are hereby cited and admonished to be and appear at a Su-

preme Court of the United States to be holden at Washington on the second Monday in October, 1888, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Tennessee, wherein Charles L. Ficklen and Charles and Edward M. Cooper, partners under the style of Cooper and Company, are plaintiffs and you are defendants in error, to show cause, if there be any, why the judgment in the said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Peter Turney, chief justice of the supreme court of the State of Tennessee, this 28th day of May, 1888.

P. TURNEY,
Chief Justice of the Supreme Court of Tennessee.

4 [Endorsed:] No. —. Circuit court of the United States, western district of Tennessee. —— —— *vs.* —— ——. Citation. Filed the 29 day of May, A. D. 1888. Jno. W. Buford, clerk, by Rob't Lindsey, D. C.

5 Supreme Court of the State of Tennessee.

C. L. FICKLEN and Others *vs.* THE TAXING DISTRICT *et al.*

Know all men by these presents that we, Marcus Cooper and Edward M. Cooper, as partners, and Charles L. Ficklen, are held and firmly bound unto The Taxing District of Shelby County and Andrew J. Harris, county trustee, in the sum of five hundred dollars, to be paid to the said obligors, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our executors and administrators, firmly by these presents.

6 Sealed with our seals. Dated this the 29 day — May, 1888.

Whereas the above-named Charles L. Ficklen and his above-named co-obligators have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment or decree rendered by the supreme court of the State of Tennessee in the above-entitled suit:

Now, therefore, the condition of this obligation is such that if the above-named Charles L. Ficklen and his above-named co-obligors shall prosecute this said writ of error to effect and answer all damages and cost if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

CHARLES L. FICKLEN AND
7 MARCUS & EDWARD M. COOPER,
By McDOWELL & McGOWAN, *Sol's.*
WILLIAM W. McDOWELL.

THE UNITED STATES OF AMERICA,
Western District of Tennessee:

I hereby certify that the surety on the foregoing bond is worth the penalty thereof over and above his liabilites and exemptions.

Witness my signature, at Memphis, Tennessee, this May 28th, A. D. 1888.

JOHN B. CLOUGH,
Clerk of the U. S. Circuit Court for said District.

Approved May 29th, 1888.
P. TURNEY,
Chief Justice.

8 STATE OF TENNESSEE, *Shelby County:*

Chancery Court of Shelby County.

Be it remembered that at a term of the chancery court of Shelby —, State aforesaid, begun and held at the court-house, in the city of Memphis, in and for said county, on Monday, the 2nd day of April, 1888, the same being the first Monday in April, 1888—present and presiding, the Hon. B. M. Estes, chancellor of said court—the following proceedings were had, to wit:

Injunction Bill. Filed Jan'y 20th, 1888.

9 C. L. FICKLIN, Doing Business under the Style of C. L. Ficklin; Marcus Cooper and E. M. Cooper, Partners under the Style of Cooper & Co., Citizens of Shelby County, State of Tennessee, Complainants,

vs.

THE TAXING DISTRICT OF SHELBY COUNTY, a Municipal Corporation Chartered by the State of Tennessee, and Andrew J. Harris, County Trustee, Def'ts.

Hon. B. M. Estes, chancellor, &c.:

Your complainants respectfully state unto your honor that they are commercial agents or merchandise brokers located within the taxing district of Shelby county, where their respective firms
10 rent a room for the purpose of keeping and, at times, exhibiting their samples and carrying on their correspondance with their respective principals; that they use no capital in their business; that they handle or deal in no merchandise, and are neither buyers nor sellers; they only engage in negotiating sales for their respective principals; they do precisely the same business that commercial drummers do, the only difference being that they are stationary, while the commercial drummers are transitory, and go from place to place and secure a temporary room at each town or city in which to exhibit their samples.

That each solicits orders for the sales of the merchandise of their respective principals and forward the same to them, when such orders are fil-ed by shipping the goods direct to the purchasers
11 thereof in the county of Shelby.

Your compl't, C. L. Ficklin, states that all of the sales negotiated by him are exclusively for non-resident firms who reside and carry on business in other States than Tennessee, and that all of the

merchandise so sold is in other States than Tenn., where the sales are made, and are shipped into this State when the orders are forwarded and filled as aforesaid.

And your compl'ts, Cooper & Co., state that at least $\frac{9}{10}$ of the sales negotiated, effected, in amount and at least $\frac{9}{10}$ of his gross commissions are derived from merchandise of non-resident firms or persons, and which merchandise is shipped into Tennessee from other States after the sales are effected as stated above.

12 Your complainants further state that they are advised and so charge that all negotiations and sales of goods and merchandise made as aforesaid between citizens of other States and citizens of Tennessee are interstate-commerce transactions, and that any attempt to tax the agents or brokers of such non-resident sellers soliciting trade and making sales as aforesaid to Memphis merchants is a burden and restraint upon interstate commerce and is inhibited by article 1, sec. 9, of the Constitution of the United States of America. They further state that the def'ts claim the right to collect from them, their respective firms, each year a privilege

13 tax of $50, and that they (the def'ts) further claim the right to collect a tax of 2½ per cent. upon their gross income or commissions derived from their said business; that they are now demanding of their respective firms the said privilege tax, and also said 2½ per cent. income tax, and refuse to accept the said privilege tax unless they will also pay said income tax and execute a penal bond to make a return to the def'ts, The County Trustee, of the gross commissions derived from the said business, and are now about to issue warrants to arrest them for their failure to pay said income tax; that def'ts assert their rights to collect these taxes under section 9, ch. 96, of the acts of 1881 and made sub-sec. 17 of sec. 22 of the taxing district acts, at page 40 of the

14 Taxing District Digest, viz: Ev-ry person or firm dealing in cotton or any other article whatever, whether as factors, brokers, buyers, or seller-, on commission or otherwise, $50 per annum, and in addition every such person or firm shall be taxed ad valorum 10 cents on every $100 of amount of capital invested in such business: Provided, however, That if such person or firm carry on the cotton or any other business in connection with the grocery or any other business the capital invested in both shall only be taxed once; but such person or firm must pay a privilege for both occupations: And provided further, That if the person taxed in this sub-section

15 have no capital invested they shall pay 2½ per cent. on their gross yearly commissions, charges, or compensation for said business, and at the time of taking out their said license they shall give bond to return said gross commissions, charges, or compensations to the trustee at the end of the year, and — the end of the year they shall make returnes to said trustee accordingly and pay to him the said 2½ per cent."

They are advised and charge that as they are neither dealers, buyers, nor sellers, but are only engaged in negotiating sales for buyers, that they are not embraced within the meaning of said sect. 9, ch. 96, of the acts of 1881.

They have each heretofore yielded to said demands, and
16 have paid the said privilege tax and income tax, except for the year 1887, and have tendered the said privilege tax of $50 and cost of issueing license for the year 1888 to said trustee, who refused to accept the same unless your complainants would also pay said income tax for the year 1887.

Compl't Ficklin states that his gross commissions for the year 1887 am't to the sum of $6,679, and compl'ts Cooper & Co. state that their said commissions amounted to the sum of $4,975.03 for the year 1887, of which $546.47 was received on domestic or Tennessee commerce. Compl'ts state that they are willing and ready to make returns to the trustee of *of* their respective gross commis-
17 sions and give bond, as required by said section 9, if required by your honor; that they are advised and charge that *if* said section 9 of ch. 96 of the acts of 1881 does not embrace their said business, but that if it does it is an attempt to burden and restrain interstate commerce and is in violation of act. 1, sect. 9, of the Constitution of the United States, as stated above. They further state that so much of said sect. 9 as attempts to impose a tax of 2½ per cent. upon their gross income or commissions derived from their said business is unconstitutional and violative of act. 1, sect. 8, act. 2, sect. 28, and act. 11, sect. 8, of the constitution of Tennessee, for the following reasons:

1. Because it is a tax upon incomes, which is inhibited by said act. 2, sec. 28.

18 2. That it is a tax upon future incomes that have no existence at the time their assessments attach to property, to wit, Jan'y 10th of each year.

3. That it is a partial tax, which is not imposed upon all others incomes of persons engaged in business in Tennessee.

4. That it is not imposed upon the incomes of all persons or firms engaged in their said business, but only those who have no capital in their business.

5. That it is unequal, because it imposes a greater tax upon your compl'ts, if they are embraced by said act, than is imposed upon others engaged in the same business of merchandise brokers and doing an equal amount of business, with $30,000 or more of capital invested in the said business.

19 6. That it is in no sense a privilege or merchants' tax, but is in effect a property tax, or in the nature of a property tax, and yet it is unequal and taxes one species of property higher than another, and that it does not tax it according to value.

7. Because it grants the privilege to merchandise brokers who are fortunate enough to have capital invested in the said business, so as to advance money on the sales of their principals and thus secure more business thereby, to do business without paying said income tax, and yet imposes the same upon your compl'ts (if they are held to come within the provisions of said act), which is forbidden by said art. 11, sec. 8.

8. That said sect. 9 of ch. 96 clearly distinguishes this tax
20 from the said $50 privilege tax, as will be seen from the 9,

10, 11, & 12 lines thereof, and that if it was it is a partial and unequal tax, imposed on only a part of the persons engaged in the same kind and class of business.

Complainants, Cooper & Co., show that they are willing to pay into court the privilege tax of $50 each, which is laid upon the occupation of broker by said act, to be held by *by* the clerk and master thereof subject to such orders as the court may make touching the same, and now offers to and does pay the same into court as aforesaid, but does not admit that *he* is liable for said privilege tax;

but complainant Ficklin expressly denies any liability either
21 to pay the said $50 tax or the said 2½ per cent. tax upon his said gross yearly commissions upon his said business. They did pay it for the year 1887, and they have offered to pay it for the year 1888, but the trustee, who is the person to whom it should be paid, has refused to receive it, because complainants decline at the same time to pay for the year 1887 2½ per cent. upon their gross commissions from their said business for the year 1887, they claiming that they are not legally bound for the same; but they executed a bond in Jan'y, 1887, to report said gross commissions. Complainants file herewith the written statement of said trustee as part of this bill, marked Exhibit "A," hereto, but it need not be copied.

The statements show the tender and payment of said sum of
22 $50 by compl't- Cooper & Co. and the refusal of said trustee to receive it; that Exhibit "B," here filed and made a part of this bill, is a true copy of the license issued to complainant Ficklin for the year 1887, and that the one issued to Cooper & Co. was like it.

Complainants further show that they are informed by the authorities of the said taxing district that unless they now report their gross commissions derived from their said business for the year 1887 and pay the said tax of 2½ per cent. on the same, and also execute bond to report their gross commissions for the year 1888 and pay said tax of $50 each, no license will be granted to them

to continue their business, and warrants will at once be
23 issued, under which they will be arrested upon the charge of misdemeanor, for doing business without license, and taken before the recorder's court and fined, according to the provisions of said act, and that said warrants and arrest and fineing under them will be continuously repeated from day to day so long as complainants shall attempt to carry on their business without compliance with such conditions; and compl'ts believe and charge, moreover, that in addition to these proceedings by warrant and arrest said authorities would also institute suit upon the bonds which they were compelled to execute in Jan'y, 1887, to report their gross commissions.

By these means said authorities will compel complainants to
24 give up their said business, and this will inflict upon them an irreparable injury in the loss of their customers and the loss of their profits, which could not be recovered in any legal action, if there was any one whom they could hold responsible for this trespass upon their rights; and complainants further show that no provision is made by the laws of Tennessee allowing them to pay

under protest and sue the tax collector to recover it. If there were, the recovery of the amount paid would not at all repair the injury. Sec. 19 of the taxing district act expressly exempts the taxing district from responsibility for "the conduct of those managing its affairs." And still further, complainants show that the valid-
25 ity of the tax which they now seek to test cannot be tested save in a court of equity, except by a multiplicity of individual suits at law, which suits in no event could be made to remedy the loss and injury which complainants would sustain by being forced to discontinue their business.

Complainants contest this tax upon the ground that it violates the constitution of the State and the Constitution of the United States. They have heretofore specified what violations of the State constitution they allege. They insist and charge that an income tax, except as distinctly specified in the Constitution, is in violation of that instrument, and that the Legislature has not undertaken by any general law to levy any
26 income tax or to declare income taxable except within the limits of the Constitution, and cannot constitutionally enact a special law taxing the income of complainants and others in like business conditions solely in the taxing district of Shelby county. Even if incomes were made taxable by the State constitution, as already alleged, the tax is unequal, partial, and not due process of law. In the premises of the Constitution of the United States, they charge that said tax is a burden and restraint attempted to be laid by the State upon interstate commerce, so far as complainants are engaged in negotiating sales of merchandise by non-residents to citizens of Ten-
27 nessee. In that part of their business complainants are "drummers" in the sense in which the Supreme Court of the United States, in 120 U. S., 489, has held a tax by the State upon "drummers" to be within the prohibition of the Federal Constitution. An unconstitutional law is now law. Those seeking to enforce such a law are not within the protection of the rules which courts have sometime established as to restraint by injunction upon the collection of revenue. The distinction is broad between such a tax and a tax merely illegal, as the courts have recognized. In the case which complainants now present, this tax is sought to be enforced and will be enforced by those *when* the act complained of, in sec. 17, protects from being proceeded against as trespassers by the provision, "That all the officers and agents employed in the administra-
28 tion of said local government should be the officers and agents of the State, so far as all their official acts touching said government is concerned."

Complainants invoke the aid of a court of equity, by its process of injunction, to prevent a multiplicity of suits, to save from irreparable injury, and to protect constitutional rights in their behalf, and of all others situated as they are—the rights and the remedy sought being intended as to all who may make themselves parties—and they ask that their bill may be filed in that aspect, and provisions made by the fiat of the court for others in like condition to come in by petition and make themselves parties complainant within such

time and upon such terms as the court by its orders shall
29 fix.

The premises considered, compl'ts pray that subpœna issue to compel the parties named as defendants in this bill to appear and answer the same, but not under oath.

That an injunction issue to restrain the def'ts or either of them from instituting any suit or proceeding against them or either of them for the collection of said 2½% tax upon their respective gross commissions from their said business or from issueing any warrant for their arrest for their failure to pay the same for the year 1887, and that def'ts be also restrained from in any way interfering with them in the carrying on their said business for the year 1888;
30 and upon final hearing they, the def'ts, be restrained perpetually from collecting from them or either of them said 2½ per cent. tax upon their said gross commissions from their said business, and from collecting said privilege tax of $50, and they pray for general relief, and will ever pray, & etc.

This is the first application for injunction upon the facts herein stated.

McDOWELL & McGOWAN,
CRAFT & COOPER,
Sol'rs for Compl'ts.

STATE OF TENN., *Shelby County:*

Personally appeared before me, E. L. McGowan, Jr., notary
31 public of said State and county, at Memphis, C. L. Ficklen and M. R. T. Cooper, complainants in the foregoing bill, who made oath in due form of law that the facts stated in the foregoing bill are true.

C. L. FICKLEN.
M. COOPER.

Subscribed and sworn to before me this January 17th, 1888.
[SEAL.] E. L. McGOWAN, JR.,
Notary Public.

Upon the execution of an injunction bond by each of the compl'ts in this bill in the penalty of one thousand dollars, with good and satisfactory security thereon, conditioned as prescribed by law,
32 the clerk and master of the chancery court of Shelby county will issue writs of injunction as prayed in the within bill. The bonds will be separate bonds, and a bond for costs will also be executed before the issuance of the process.

Memphis, Jan'y 18th, 1888.

B. M. ESTES,
Chancellor.

EXHIBIT "A" TO BILL.

MEMPHIS, TENN., *Jan'y* 14, 1888.

This — to certify that C. L. Ficklen and Cooper & Co., commercial brokers, have tendered to me, as trustee, fifty dollars & 25 cents each

as their privilege tax and charges for the year 1888, which I refuse to accept, because they refuse to pay, for the year 1887, 2½
33 per cent. upon their gross commissions derived from their said business for the year 1887, they claiming that they are not legally liable for the same; but they executed a bond in Jan'y, 1887, to report said gross commissions.

A. J. HARRIS, *T'r.*
J. J. WILLIAMS, *D. T.*

Cooper & Co., gross commissions	$4,975 03
Of this there is, from domestic business	546 47
Bal.	4,428 56
C. L. Ficklin's gross com.	$2,671 89

EXHIBIT "B" TO BILL.

No. 481.

REGISTER'S OFFICE, TAXING DISTRICT OF SHELBY COUNTY, TENN., *Jan'y* 17, 1887.

C. L. Ficklen having paid the sum of fifty dollars for the
34 use of the taxing district and executed bonds agreeably to its requirements, this is, therefore, to license and give full authority to said party, from this date untill the 31 day of Dec., 1887, as mdse. brokers, 5½ Madison, within the limits of the district, subject always to the ordinances, rules, and regulations of the legislative council now in force, as well as those which may be passed by the legislative council.

In testimony whereof I have hereunto set my hand the date above written.

B. K. PULLEN, JR.,
Register T. D., S. C.

Countersigned:
J. H. ALSUP, *Trustee.*

This license cannot be used by another until the transfer is made on the books of the register.
Register's fee, 25c.

35 *Injunction Bond.*

We, Cooper & Co. and s'ty, acknowledge ourselves indebted to the Taxing District of Shelby County *et al.* in the sum of one thousand dollars.

The condition of the above bond is such that whereas the said Cooper & Co., complainants, have this day filed their bill in the chancery court of Shelby county against the said Taxing District of Shelby County *et al.*, defendants, and obtained an order for the issuance of the writs of injunction, in accordance with said order, upon the execution of this bond: Now, if the said complainants shall

comply with and perform the orders and decrees of the court
36 in case said injunction is dissolved, and shall pay to said defendants such damages as shall be awarded to or recovered by them for the wrongful sueing out of the injunction, and also such costs as may be awarded to them by the court, then this obligation to be void.

Witness our hands and seals this 18th day of January, 1888.

M. COOPER,
J. R. TAYLOR,
C. L. FICKLIN.

Injunction Bond.

We, C. L. Ficklen and s'ty, acknowledge ourselves indebted to the Taxing District of Shelby County *et al.* in the sum of one thousand dollars.

The condition of the above bond is such that whereas the
37 said C. L. Ficklen, complainant, has this day filed his bill in the chancery court of Shelby county against the said Taxing District of Shelby County *et al.*, defendants, and obtained an order for the issuance of the writ of injunction in accordance with said order upon the execution of this bond: Now, if the said complainants shall comply with and perform the orders and decrees of the court in case said injunction is dissolved and shall pay to said defendants such damages as shall be awarded to or recovered by them for the wrongful sueing out of the injunction, and also such costs as may be awarded to them by the court, then this obligation to be void.

38 Witness our hands and seals this 18 day of January, 1888.

C. L. FICKLEN.
M. COOPER.

Cost Bond.

We, C. L. Ficklen and Cooper & Co., as principals and surety, acknowledge ourselves indebted to the Taxing District of Shelby County *et al.* in the sum of two hundred and fifty dollars, to be void if the said C. L. Ficklen *et al.*, complainants in a bill which has this day been filed in the chancery court of Shelby county against the said Taxing District of Shelby Co. *et al.*, shall pay all such costs as may be awarded against them by the court in its decrees and orders in said cause.

This 18th day of Jan'y, A. D. 1888.

39 M. COOPER.
J. R. TAYLOR.

Injunction writ issued Jan'y 20th, 1888, and executed on defendant same day.

S'p'a to answer and copy issued Jan'y 28th, 1888, and executed on defendants same day. Copy of bill left with D. P. Hadden, pres't taxing dist.

Demurrer of Defendants. Filed 17 *Day of A'p'l,* 1888.

C. L. FICKLEN *et al.*
vs.
THE TAXING DISTRICT OF SHELBY COUNTY *et al.*

Demurrer.

The defendants, by their solicitor, come and demur to the
40 bill filed against them in the above-entitled cause, and assign the grounds of demurrer following, viz:

1. The tax, the collection the plaintiff- by their bill resist & enjoin, is throughout a privilege tax, in whole and in all its parts. It is not a property tax nor a tax on income or commission, but a privilege tax, the amount of which is to be ascertained in part by a percentage of the capital invested in business or by a percentage of the gross commissions earned.

As a privilege tax it was and is within the constitutional powers of the Legislature, and is not repugnant to any of the clauses or provisions of the constitution of the State referred to and relied
41 on in the bill as rendering it invalid. On the contrary, it is authorized by article II, section 28, of the State constitution. A privilege tax measured by a percentage of capital invested as commissions received is not forbidden by anything in the State constitution contained, nor is there anything in the section in question under which the tax is claimed by which the persons therein embraced are divided into classes, viz., of those having and those not having capital, repugnant to any provision of the constitution of the State.

2. It appears by the bill that the plaintiff- for and at the beginning of the year 1887 took out license for one year as "merchandise brokers;" that they respectively paid the fixed charges of
42 $50 and gave bond to report their gross commissions for the end of the year, and that they held the license for and during the year 1887.

Plaintiffs are therefore bound to report their commissions for said year and to pay two and a half per centum thereof as the price of the privilege thus taken and held by them. The fact of their principals being residents or non-residents of the State is wholly immaterial to the question of their liability to pay at the end of the year the balance of the tax, viz., a sum equal to 2½ per cent of their gross commissions received during the year.

3. The plaintiffs, Cooper & Co., admit that a portion of their principals are residents of this State. They are liable, there-
43 fore, for the whole tax—the fixed sum of $50.00 and 2½ per cent. of their entire gross commissions. Their liability for the 2½ per cent. of their commissions stands on the same footing with their liability for the fixed charge of $50.00, and cannot be apportioned or reduced to 2½ per cent. of the commissions received on the business done for resident principals.

4. The clause of the Constitution of the United States conferring

upon Congress the power to regulate commerce among the States does not affect the validity of the tax in question. Complainants are residents of the State, under the protection of its laws and government, and therein pursuing, respectively, a taxable avo-
44 cation. They will not be heard to dispute their liability to contribute their proportion of the burden of maintaining the State government on the ground that their principals are non-residents of the State. The tax in question is not a tax on their principals, but a privilege tax on themselves, citizens and residents of the State, for pursueing a taxable vocation therein.

5. It appears from the bill that the plaintiff applied to the defendant Harris, trustee and tax collector, for a license as "merchandise brokers" for the year 1888—that is, for a license in form the same as had been issued to them for the year 1887. The license as applied for was to be general and unrestricted. Under it, if issued,
45 plantiff would be licensed and entitled to pursue the business of merchandise brokerage generally and without restriction. What they intended or expected to do under the license, and whether the business to be done thereunder would — done for resident or non-resident principals, was wholly immaterial.

To entitle the plaintiff to the license applied for they were bound to comply with the provisions of the tax law referred to in the bill.

S. P. WALKER,
Sol. for Def'ts.

Final Decree. Entered April 23d, 1888.

46 C. L. FICKLEN & *al.*
vs.
TAXING DISTRICT OF SHELBY COUNTY. } 6797.

This cause came on to be heard on the demurrer of def'ts in the bill and the court, after argument of counsel and consideration of the causes, being ful-y advised as to the matters of law arising upon said demurrer, does now order, adjudge, and decree that the same be overruled, with leave to defendant to answer.

And thereupon defendants in open court, being so advised, declines to answer and elects to stand upon its said demurrer. It is therefore ordered by the court, upon motion of complainants, that the bill be taken for confessed for want of answer, and that the cause proceed at once to a final decree.

47 And thereupon it is by the court ordered, adjudged, and decreed that the tax sought to be enforced against complainants and resisted by complainants upon the various grounds in the bill set out is not illegal, unconstitutional, or invalid by reason of any of the objections alleged in the bill as growing out of the constitution and laws of the State of Tennessee, but that so far as complainants are engaged in selling goods, wares, merchandise, or property by sample and on commission, which belong wholly to non-resident owners, said tax is a burden upon interstate commerce and is to that extent and no further in violation of the Constitution of

the United States, and that complainants are not "drum-
48 mers," having no licensed houses of business in the sense of the taxing-district law in reference to drummers, but that they are "merchandise brokers" and subject as such to the tax which by this proceeding they resist, except in so far as their business concerns interstate commerce.

And it now appearing to the court that for the year 1887 complainants paid the sum of $50 each, as required by the statute, and gave bond to report at the end of the year from the date thereof the amount of their commissions upon their business as such "merchandise brokers" done during the year, and complainant Ficklen has now reported that his business was wholly interstate commerce, and that the entire tax sought to be collected from him is there-
49 fore illegal and void, it is by the court ordered, adjudged, and decreed that as to said Ficklen the injunction granted herein be made perpetual; and it appearing that complainants, Cooper & Co., have reported that nine-tenths of the business done by them *has* interstate commerce and one-tenth was for owners residing in Tennessee, it is therefore by the court ordered, adjudged, and decreed that complainants, Cooper & Co., are legally bound to pay the sum of $50.00 and the said tax of 2½ per cent. on their commissions to the extent that those commissions were upon sales of property owned by residents of Tennessee as a privilege tax upon their business of merchandise brokerage for the year 1888.
50 It is therefore ordered, adjudged, and decreed by the court that the injunction be also perpetuated as to complainants, Cooper & Co., but only upon condition that they report the amount of commissions received by them in the fiscal year of 1887 from business for residents of this State and pay the license tax as aforesaid. The costs of the cause will be paid by defendant, for which execution may issue.

From the foregoing decree the defendants pray an appeal to the current term of the supreme court of Tennessee, sitting at Jackson, which is granted upon their giving bond for costs of the appeal within 30 days from this date, with surety satisfactory to the clerk and master.

51 *Order Allowing Compl't- to Appeal. Entered Ap'l* 23, 1888.

C. A. FICKLEN & *al.*
vs.
THE TAXING DISTRICT OF SHELBY CO. *et al.* } 6797.

In this cause the complainants appear and pray a special appeal to the current term of the supreme court of the State from so much of the decree herein as affirms the validity of the tax law referred to in the bill, so far as concerns the constitution of the State, and the complainants, Cooper & Co., pray a special appeal from so much of said decree as holds them liable to pay the fixed tax of $50.00 and 2½ per cent. on the commissions earned in business done for resident principals; all of which is granted upon complainants giving

52 bond for the costs of said appeal within 30 days from this date, surety to be satisfactory to and accepted by the clerk and master.

Appeal Bond. Filed April 24, 1888.

We, C. L. Ficklen and Cooper & Co. (composed of Marcus & Eli Cooper), appellants, and —— ——, surety, acknowledge ourselves indebted to The Taxing District of Shelby County *et al.*, appellees, in the sum of two hundred and fifty dollars, to be void if the said C. L. Ficklen and others above named as appellants, who have prayed for and obtained an appeal from the decree of the chancery court
53 of Shelby county, in a cause in which C. L. Ficklin *et al.* are complainants and The Taxing District of Shelby County *et al.* defendants, to the present term of the supreme court of Tennessee for the district of West Tennessee, held at Jackson, Madison county, on the first Monday in April, 1888, shall pay all such costs as shall be awarded against them by the supreme court.

This 24th day of April, 1888.

C. L. FICKLIN &
COOPER & CO.,
By W. W. McDOWELL, *Sol'r.*
W. W. McDOWELL.

Appeal Bond.

We, The Taxing District of Shelby County and A. J. Harris,
54 trustee, appellants and —— ——, surety, acknowledge ourselves indebted to C. L. Ficklen *et al.*, appellees, in the sum of two hundred and fifty dollars, to be void if the said taxing district of Shelby Co., and others above named as appellants, who have prayed for and obtained an appeal from the decree of the chancery court of Shelby county, in a cause in which C. L. Ficklen *et al.* are complainants and The Taxing District of Shelby County *et al.* are defendants, to the present term of the supreme court of Tennessee for the district of West Tennessee, held at Jackson, Madison county, on the first Monday in April, 1888, shall pay all such costs as shall be
55 awarded against them by said supreme court.

This 26th day of April, 1888.

TAXING DISTRICT OF SHELBY
COUNTY, TENN.,
By D. P. HADDEN, *Pres't.*
D. P. HADDEN, *Surety.*

56 THE STATE OF TENNESSEE:

Pleas before the supreme court of said State, for the western division thereof, at Jackson, at the April term, A. D. 1888.

Present: The Hon. Peter Turney, chief justice, and D. L. Snodgrass, H. H. Lurton, W. C. Caldwell, and W. C. Folkes, associate judges, when the following proceedings were had, to wit:

C. L. FICKLEN *et al.*
vs.
TAXING DIST. OF SHELBY CO. } # 1298, Shelby Ch'y Docket.

This cause came on to be heard on the transcript of the record from the chancery court of Shelby county, and, having been argued by counsel an- considered by the court, the court is of opinion—

1st. That the act of the Legislature of the State approved April 4th, 1881, being chapter 96 of the Acts of 1881, so far as drawn
57 in question in this case, is not obnoxious to or violative of any provisions of the constitution of this State, and that sec. 9 of said act, — one brought in question, is a valid enactment, so far as concerns the alleged violations of the State constitution.

2d. The court is of opinion that inasmuch as it appears from the bill that the complainant- at the beginning of the year 1887 applied for and received, respectively, license to carry on the business of commission brokers without qualification, and that they, the complainants, held said license throughout the year 1887, complainants were charg-able with the privilege tax, as fixed by the act aforesaid, without regard to the amount or character of the
58 business carried on under said licenses or the place- of residences of their principals, and that complainants must have reported and paid 2½ per cent. on the gross commissions received by them during the year 1887 before they could have become entitled to licenses for the year 1888.

3d. The court is of opinion that when at the beginning of the year 1888 the complainants *com*plied for license as merchandise brokers they were rightfully required (1) to report and pay 2½ per cent. on their commissions received during 1887, and (2) to pay the fixed charge of $50.00 and give bond to report their gross commissions at the end of the year 1888.

(4). The court is of opinion that the said act is not, as to
59 these complainants, violative of article first, sec. 8, of the Constitution of the United States, by which the power to regulate commerce between the States is conferred upon the Congress of the United States; and it is further of the opinion that complainants, having applied for, accepted, and held for and during the year 1887 unqualified license as commission brokers, and having applied for the same unqualified license for the year 1888, cannot question the validity of the said act as being in conflict with said provisions of the Constitution of the United States, for that the said complainants were not entitled to the said license upon the facts stated in the bill, whether the business actually — and therefore conducted by
60 them was or was not exonerated from said privilege tax under the said provision of the Federal Constitution.

It is therefore ordered and adjudged that the decree of the court below be, and it is, reversed; that the demurrer of the defendant is sustained and complainants' bill dismissed. All the costs of the cause in this court and the court below will be paid by complainants, for which execution will issue against them and their sureties on the cost bond.

THE STATE OF TENNESSEE:

I, John W. Buford, clerk of the supreme court of said State, for the western division thereof, at Jackson, do hereby certify that the foregoing is a true, perfect, and complete copy of the record & decree pronounced by said court at its April term, 1888, in the cause of C. L. Ficklen *et al.* against Taxing District of Shelby Co., as appears of record now on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the court, at office, in the city of Jackson, on this the 15th day of August, A. D. 1888, and of the Independence of the United States the 113th year.

(Seal Supreme Court of Tennessee, Western Division, Jackson, Tennessee.)

JNO. W. BUFORD, *Clerk*,
By ROBT LINDSEY, *D. C.*

Endorsed on cover: Tennessee sup. court. No. 1087. Charles L. Ficklen and Charles Cooper, and Edward M. Cooper, partners under the style of Cooper & Company, plaintiffs in error, *vs.* The Taxing District of Shelby county, Tennessee, and Andrew J. Harris. Filed September 11, 1888.

IN SUPREME COURT OF UNITED STATES

October Term, 1888.

C. L. FICKLEN, et als, Plaintiffs in Error.

VS. } NO. 1087

THE TAXING DISTRICT OF SHELBY COUNTY, TENN., et als, Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

McDOWELL & McGOWAN,
CRAFT & CRAFT,
Attorneys for Plaintiffs in Error.

E. Whitmore Printer, Memphis, Tenn.

IN SUPREME COURT OF UNITED STATES

October Term, 1888.

C. L. FICKLEN, et als, Plaintiffs in Error.

VS. } NO. 1087

THE TAXING DISTRICT OF SHELBY COUNTY, TENN., et als, Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

ASSIGNMENT OF ERROR.

This cause comes to this court by writ of error to the Supreme Court of Tennessee, and we assign as error the reversal, by the Supreme Court of Tennessee, of the Chancellor's decree.

—o—

Plaintiffs in Error are "Merchandise Brokers," residing and doing business in said Taxing District of Shelby County Tennessee. They filed their bill in the Chancery Court of Shelby County, at Memphis, to restrain Defendants in Error, by injunction, from collecting a tax from them which Defendants in Error were seeking to collect under the Act of the Legislature of Tennessee, and amendments thereof, known as the "Taxing District Act." The part of that Act relied upon as authority for collecting this tax, as quoted from the "Taxing District Digest, 1887," is as follows:

SEC. 22. *Be it further enacted*, That the following named ...s of business and occupations be and the same are hereby

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"SEC. 22. *Be it further enacted*, That the following named kinds of business and occupations be and the same are hereby

declared taxable privileges, and shall be taxed as herein provided; and the exercising of any of said privileges, without first paying the tax hereby fixed, shall be a misdemeanor:

* * * * * *

17. Every person or firm dealing in cotton or any other article whatever, whether as factor, broker, buyer or seller on commission, or otherwise, $50.00 per annum, and in addition every such person or firm shall be taxed ad valorem, 10 cents on every $100. of amount of capital invested in such business, provided, however, that if such person or firm carry on the cotton or other business, in connection with the grocery or any other business, the capital in both, shall only be taxed once; but such person or firm must pay the privilege tax for both occupations; and provided further, that if the persons taxed in this sub-section have no capital invested, they shall pay 2½ per cent. on their gross yearly commissions, charges or compensation for said business, and at the time of taking out their said license they shall give bond to return said gross commissions, charges or compensation to the trustee at the end of the year; and at the end of the year, they shall make returns to said trustee accordingly, and pay to him the said 2½ per cent."

Complt. Ficklen is engaged exclusively in the negotiation of sales of merchandise of non-residents of the State of Tennessee, whose goods and merchandise are in other States than Tennessee when the sales are so made.

Complt. Cooper & Co. do a like business to the extent of 9-10 of their business, while 1-10 of it is internal commerce business.

It was claimed by the bill that this law is, for various reasons, unconstitutional under the Constitution of Tennessee.

A further claim of the bill is thus made:

"Your Complainants further state that they are advised, and so charge, that all negotiations and sales of goods and merchandise made as aforesaid between citizens of other states and citizens of Tennessee, are 'Inter-State Commerce' transactions, and that any attempt to tax the agents or brokers of such non-resident sellers, soliciting trade and making sales as aforesaid to

Memphis merchants, is (an attempt to impose) a burden and restraint upon Inter-State Commerce, and is inhibited by Art. I., Sec. 9, of the Constitution of the United States."

The preliminary injunction was granted. There was a demurrer to the bill in the Chancery Court. The Chancellor sustained this demurrer as to all the grounds set out in the bill, except the "Federal question," as quoted above. On this question the Chancellor, in his opinion, said:

"The latest case, and the one most analagous to this is that of *Robbins vs. The Taxing District*, 120 U. S., 490, in which it was decided by five Judges—three dissenting—that a tax imposed by authority of the State of Tennessee upon a drummer who sold goods for a Cincinnati merchant, by sample, was a burden on Inter-State Commerce and therefore unconstitutional. It must be apparent to any judge or lawyer, that this decision pushes the principles applicable to Inter-State Commerce very far, but the Court that made it is the final arbiter of the question involved and all other Courts in this country must yield obedience to its authority.

"Now the only differences between that case and this are that in the one the agent sought to be taxed was a non-resident of the State and plied his vocation by travelling from point to point, while the Complts. here are residents of Tennessee, and have fixed places of business in the Taxing District.

"Then can these differences affect the question, whether the tax is a burden upon Inter-State Commerce? I confess that I am unable to see any substantial difference so far as the point under consideration is concerned.

"In the opinion of the Court, it is stated that the negotiation of sales of goods, which are in another State, for the purpose of introducing them into the State in which the negotiation is made is Inter-State Commerce.

"When, therefore, it is decided that a tax against the agent who makes the negotiation is a burden on Inter-State Commerce, can it possibly make any difference, so far as the question of the burden on the commerce is concerned, whether the agent is a non-resident and a traveller on the one hand, or a resident with a fixed place of business on the other."

The Defendants in the Chancery Court declining to answer, a final decree was rendered by that Court, which is embraced in this record. From that decree we quote as follows:

"And therefore it is by the Court ordered, adjudged and decreed that the tax sought to be enforced against the Complainants, and resisted by Complainants upon the various grounds in the bill set out, is not illegal, unconstitutional or invalid by reason of any of the objections alleged in the bill, as growing out of the Constitution and Laws of the State of Tennessee; but that, so far as Complaintants are engaged in selling goods, wares, merchandise or property by sample, and on commission, which belong wholly to non-resident owners, said tax is a burden upon Inter-State Commerce, and is, to that extent. and no further, in violation of the Constitution of the United States; and that Complainants are not '*Drummers*,' having no licensed houses of business, in the sense of the Taxing District law in reference to drummers, but that they are '*Merchandise Brokers*,' and subject, as such, to the tax which, by this proceeding, they resist, except so far as their business concerns Inter-State Commerce. And it now appearing to the Court that, for the year 1887, Complainants paid the sum of $50.00 each, as required by the Statute, and gave bonds to report, at the end of the year from the date thereof, the amount of their commissions upon their business as such merchandise brokers, done during that year, and that Complainant Ficklin has now reported that his business was wholly Inter State Commerce, and that the entire tax sought to be collected from him is, therefore, illegal and void: it is, by the Court, ordered, adjudged and decreed that, as to said Ficklen, the injunction granted herein be made perpetual. And it appearing that the Complainants, Cooper & Co., have reported that nine-tenths of the business done by them was Inter-State Commerce, and one-tenth was for owners residing in Tennessee; it is, therefore, by the Court, ordered, adjudged and decreed that Complainants, Cooper & Co., are legally bound to pay the sum of $50.00 and the said tax of 2½ per cent. on their commissions to the extent that those commissions were upon sales of property owned by residents of Tennessee, as a Privilege Tax upon their business of merchandise brokerage for the year 1887: it is, therefore, ordered, adjudged and decreed by the Court that the injunc-

tion be also perpetuated as to Complainants, Cooper & Co., but only upon condition that they report the amount of commissions received by them in the fiscal year 1887, for business done for residents of this State, and pay the license tax as aforesaid. The cost of this cause will be paid by Defendants, for which execution may issue."

Upon appeal by Defendants, the Supreme Court of Tennessee reversed this decree of the Chanceller. No opinion was delivered by the Supreme Court, but from its decree, embraced in this record, it appears that the reversal was upon the Federal question alone. It is the judgment of the Supreme Court of Tennessee which, by this writ of error, is brought to this Court for revision.

The precise points involved in our assignment of errors are these :

The Chancellor held that Ficklen could not be required to pay either the $50.00 tax or the 2½ per cent. upon his commissions, because his business was wholly Inter-State Commerce.

And that Cooper & Co. could be required to pay $50.00 and 2½ per cent. upon so much of their commissions as arose from business done for residents of Tennessee, because it was, in part, of that sort; but that they could not be required to pay any tax whatever upon so much of their business as was Inter-State Commerce.

The Supreme Court of Tennessee adjudged that both Ficklin and Cooper & Co. were liable for both the $50.00 tax and the 2½ per cent. upon *all* their commissions, because in the opinion of that Court, the case does not fall within the principle, and is not controlled by the decision of the Robbins case.

The Robblns case has now been re-affirmed by a series of decisions, including

Ashew vs. Texas, 9 *Sup. Ct. Rep. P.* 1.

Schloss vs. Mobile, 127 *U. S.*, 640.

And the re-affirmance has been made with great emphasis.

It is therefore only necessary now to inquire whether the Chancellor or the Supreme Court was right in deciding that this case is, or is not, controlled by it. The Chancellor held, as quoted from his opinion as follows:

"Now the only differences between that (the Robbins) case and this are that in the one the agent sought to be taxed was a non-resident of the State, and plied his vocation by travelling from point to point (was a drummer), while the complaintants here are residents of Tennessee, and have fixed places of business in the Taxing District (are Merchandise Brokers). Then can these differences affect the question whether the tax is a burden upon Inter-State Commerce? I confess that I am unable to see any substantial difference so far as the point under consideration is concerned. * * When, therefore, it is decided that a tax against the agent who makes the negotiations is a burden on Inter-State Commerce, can it possibly make any difference, so far as the question of the burden on the Commerce is concerned, whether the agent is a non-resident, and a traveller, on the one hand, or a resident, with a fixed place of business on the other?"

If we assume that the Supreme Court, in reversing the decree of the Chancellor, recognized the Robbins case as settled law, the reversal must have proceeded either upon the ground that Plaintiffs in error are not technically "Drummers;" or that, conceding the Robbins case to be broad enough to embrace Merchandise Brokers, still it does not apply when the Merchandise Broker resides in the State seeking to enforce the tax.

We submit that, upon the face of the Robbins case, and of the subsequent cases in which it has been re-affirmed, the principle is too broad to be limited to a technical "Drummer," and is in no wise affected by the residence or non-residence of the agent through whom the tax is sought to be enforced.

As far back as the case of

Welton vs. Missouri, 91, *U. S.* 278,

it was said by this court:

"The general power of the States to impose taxes in the way of license upon all pursuits and occupations within its limits may

be conceded, but like all other powers must be exercised in subordination to the requirements of the Federal Constitution."

"Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is, in effect, a tax on the goods themselves.

"If such a tax be within the power of the State to levy, it matters not whether it be raised directly from the goods or indirectly through the license to the dealer. But, if such a tax conflict with any of the powers of the Constitution of the United States, it will not be any less invalid, because enforced in the forms of personal license."

Again it is decided that "taxing is one of the forms of regulation. It is one of the principal forms, as it is a burden upon it. Clearly this cannot be done."

Phil. Southern Steamship Co. vs. 122, *U. S.* 335.

"For all must perceive," says the Court, in the case of Brown vs. Md., 12 Wheat, 656, "that the tax upon the sale of an article imported only for sale is a tax on the article itself."

Jenkins vs. Ewen, 8 *Heisk.*, 482.

Therefore, as the power of the State to impose taxes by way of license on pursuits and occupations, is subordinate to the requirements of the Federal Constitution; and, as a tax upon the business or occupation, consisting in the sale of goods is, in effect, a tax on the goods themselves, such a tax is clearly a tax upon Inter-State Commerce, and as Complt. Ficklen is engaged exclusively in making such sales for principals, it must follow that a tax upon his business is a tax on the goods themselves, and hence the tax is unconstitutional.

This is made apparent from the decisions in the Robbins case, and subsequent cases based thereon. In that case the Court in referring to the tax, sought to be enforced against Robbins by the Taxing District, said: "It cannot impose taxes "upon goods imported into the State from another State, and "not yet become a part of the mass of property therein; and no "discrimination can be made directly affecting Inter-State Com- "merce." And further says: "How is a merchant or manu-

"facturer of one State to secure orders for the purchase of "his goods in another State, if he may be taxed, by such State "for so doing? Who shall limit the tax? It may amount to "prohibition. To say that such a tax is not a burden upon "Inter-State Commerce, is to speak unadvisedly and without "due attention to the truth of the matter. * * * "The truth is, in numberless instances, the most feasible, if not "the only praticable way for the merchant or manufacturer to "obtain orders in other States, is to obtain them through personal "application, either by himself or some one employed by him-"self for that purpose."

And that is precisely what Ficklen is doing for his principals. The agency by which the sales are made, cannot be taxed, be that agency or instrument of sale, local or transitory, resident or non-resident.

For the Court further said, "the right to tax would apply "equally well to the principal as to the agent."

Ib. 496.

And this rule also applies equally as well to Ficklen, as to the drummer.

It is the agent securing orders for the purchase of Inter-State Commerce goods that is sought to be taxed in either case, and this cannot be done. For the merchant wishing to dispose of his goods has the right to employ agents to do so, and he is not confined to the employment of drummers. He may adopt any other legal mode he may desire for securing such orders.

Ib. 495.

For if the securing of orders cannot be taxed that is decisive of this case.

Now, as the right to impose a tax on the agent for securing orders would apply also to the principal if he were doing so—does it not necessarily follow that it would apply equally well to all agents securing orders in the same way, whether they reside in or out of the State.

Can it possibly make any difference where the agent lives when it is conclusively settled that such a tax is a tax upon the Inter-State Commerce, and not in fact and effect upon the agent, whether he be a drummer or broker.

This being so, the principle is the same as was held in the case of Ex-parte Stockton, (a drummer,) 33 Fed. Rep. Vol. 2. page 95, in which Judge Sabin says:

"What would be thought of New York or New Engiand if they were to tax the citizens of Texas or other Southern States for the sale of cotton, hides, wool and other articles of commerce sought to be sold by them, by their agents, drummers or factors, by levying a tax on such sales by samples therein."

Factors, the court will judicially know, are residents of the place where they do business and keep an office.

The Judge then concludes in these words: "The law in this case is utterly void so far as it effects the commerce of citizens of other States, having no goods herein, but selling herein by sample."

Thus disregarding the question as to residence of the drummer, and resting the decision on the fact that he was an agent of the owner of the Inter-State Commerce.

The case of Ex-parte Rosenblatt,

14 *Pacific Rep.* 298, *by the Supreme Court of Nevada*,

is to the same effect.

And so are the cases of Simmons Hardware Co. vs. McGuire,

2 *Southern Rep.*, 592.

And the State vs. Pratt.

9 *Albany, Rep.*, 556.

Therefore it is the tax on the agency, by which the non-resident principal seeks to dispose of his Inter State Commerce goods that makes the tax illegal. It is true, that the Court in the Robbins case, refers to the fact that Robbins was a citizen of the State of Ohio, but it rests the decision upon the ground that a tax upon the person securing orders for the sale of his

principal's goods, was, in effect, a tax upon the goods. Robbins and Ficklen both solicit orders in the same way. They carry on the same business. And the fact that they are called by different names, and that one is local and the other transitory in soliciting orders, cannot effect the principle.

The case of Cook vs. Penn., 97 U. S., settles this question.

Cook was carrying on the business of an auctioneer in Philadelphia, and as such auctioneer was required to take out a license to make report of his sales of foreign merchandise, and to pay into the Treasury ¾ of 1 per cent. upon the amount of his sales.

This statute is identical with the one under discussion, except that the tax in Pennsylvania was measured by the amount of sales instead of by the gross commissions.

In that case it was argued for the State, as here, "that the "authority of the auctioneer to make any sales was derived "from the State, and that the State can therefore impose upon "him a tax for the privilege conferred, and that the mode "adopted by the statute of measuring that tax is within the "power of the State. That, being a tax for the right or privi-"lege to sell at auction, it is not a tax on the article sold, but "that the amount of sales by him is made the measure of the "tax on the privilege." The Court in reply, said: "The ar-"gument is fallacious, because without an auctioneer's license, "the owner could not have sold at auction even his own "goods."

Neither could the owner open an office in Memphis, and sell his goods by sample under this Act.

For the Act says: "All dealers in cotton or any other article, "whether as factor, broker, seller, buyer or otherwise."

The Court in that case, further says: "It was then a tax on "the privilege of selling foreign goods at auction, for such "goods could only be sold at auction by paying a tax on the "amount of sales."

This case is approved and extended in the case of Fargo vs. Mich. 121, U. S. 244, which is later than the Robbins case, in which the Court says: "It was there argued that said tax was

"exclusively upon the business of auctioneer which the State "had a right to levy. That it was for the privilege of being an "auctioneer."

The Court replied "that it was a regulation of commerce, "and that the fact that it was a tax on the business of an auc- "tioneer, did not relieve it from the objection arising from "the constitutional provision."

This case directly holds a resident auctioneer selling Inter-State Commerce goods could not be taxed upon his business. And for the same reason it must be held that Ficklen cannot be taxed.

It was for a like reason that the tax upon Robbins was illegal.

This is made more apparent from a subsequent part of the opinion of Justice Miller, in the Fargo case, where he, in refering to the ruling in the Robbins case, said: "The whole sub- "ject is reconsidered in this case, by Justice Bradly, who de- "livered the opinion of the Court, in which it is held that the "business in which Robbins was engaged, namely, that of sell- "ing goods by sample, which were in the State of Ohio at the "time, and were to be delivered in Memphis, Tennessee, consti- "tuted Inter-State Commerce. and that so far as this tax was to "be imposed on Robbins for doing that kind of business, it "was a tax upon Inter-State Commerce,and therefore not within "the power of the State to enforce."

121 *U. S.*, 246-7.

Some reliance has been placed upon the dissenting opinion of Justice Waite, in the Robbins case, as indicating that in this case, the Court would decide differently; but that dissent fully sustains our contention. The Chief Justice uses these words: "What can be the difference in principle, so far as this question "is concerned whether he takes a room in a business block of "the District, where, when he comes, he sends his boxes and "exhibits his wares, or engages a room temporarily at a hotel or "a private house, or carries on his business there during his stay."

Then, as there can be no difference, as Judge Waite says, in principle, must we not conclude that the Court will apply the same rule in both cases?

It was a mistake to assume that the Chief Justice distinguished this class of cases from the Robbins case. He did the very reverse, and expressly brought our case within the same principle, but said he did not believe the majority of the Court would extend it to this class of cases. No such case had ever been before them. The purpose to sustain the principle laid down in the Robbins case is shown in the opinion of the Court in the case of the Philadelphia Southern Steamship Co. vs. Pa., 122 U. S., 347, where it over-rules the case of the State tax on gross receipts, 15 Wall., 284, so far as it decided, that the tax on the gross receipts of the railroad, being collectible only once in six months, was laid npon a fund which had become the property of the Company mingled with its other property, and incorporated in the general mass of property, was constitutional.

This ruling was reversed in the above case and such a tax declared to be a burden upon Inter-State Commerce, except where it could be placed upon the franchise of the Company.

These authorities, we submit, conclusively establish that both the $50 fixed and the 2½ per cent. on commissions, sought to be imposed upon Ficklen are unconstitutional. For if the agency cannot be taxed, the $50 is as much a burden upon Inter-State Commerce as the 2½ per cent. and so the Chancellor held.

It is manifest, that if the tax as to Ficklen is illegal on the ground that it is a tax upon Inter-State Commerce, the 2½ per cent. tax upon Cooper & Co.'s commissions, derived from Inter-State Commerce, is equally so.

But it is argued that because they do a small amount of internal business for a firm within the State, this makes the whole tax, as to them, valid, on the ground that it is but one privilege tax, and as such, cannot be partitioned.

This Court has passed upon this very question, saying: "A State may tax its internal commerce, but if an Act to tax "its Inter-State or Foreign Commerce, is unconstitutional, it is "not cured by including in its provisions, subjects within the "jurisdiction of the State."

Fargo vs. Mich., 121, *U. S.*, 241.

Philadelphia Southern Steamship Company vs. Pa., 122, *U., S.* 340.

It is also argued that if the statute be unconstutional, complaintants cannot get relief or dispute their liability, because they took out license at the beginning of the year 1887, for which they paid $50 down, and gave bond to report their gross commissions, etc.

This would be to hold parties for an illegal tax in 1888, because they paid it in 1887, and that the payment of a part of an illegal tax renders them liable for the balance of it. The giving of the bond to report was no promise to pay the tax. But if they have given a bond to pay an illegal tax, such contract would be without consideration and void.

1 *Heisk.*, 518.

1 *Sneed*, 376.

This court has left no room for question as to the Inter-State character of the business brought under consideration in this case. Has it left any more room for question as to the power of the State to impose restrictions upon any agencies necessary to its prosecution?

"The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, it is Inter-State Commerce."

Robbins case, 120, *U. S.*, 497.

"In a word, it may be said that in the matter of Inter-State Commerce, the United States are but one country, and are, and must be, subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that Commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further on the subject.

In view of these fundamental principles, which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a State to levy a tax or impose any other restrictions upon the citizens or inhabitants of other States for selling or seeking to sell their goods in such State before they are introduced therein. Do not such restrictions affect the very foundation of Inter-State trade?"

Robbins case, page 494.

"But it will be said that a denial of this power of taxation will interfere with the right of the State to tax business pursuits and callings carried on within its limits, and its right to require licenses for carrying on those which are declared to be privileges. This may be true, to a certain extent, but only in those cases in which the States themselves, as well as individual citizens, are subject to the restraints of the higher law of the Constitution, and this interference will be very limited in its operation. It will only prevent the levy of a tax, or the requirement of a license, for making negotiations in the conduct of Inter-State Commerce; and it may well be asked where the State gets authority for imposing burdens on that branch of business any more than for imposing a tax on the business of importing from foreign countries, or even on that of Postmaster or United States Marshal. The mere calling the business of a drummer a privilege cannot make it so. Can the State legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a State privilege to carry on Inter-State Commerce?"

Robbins case, page 496.

But that the Supreme Courts of Texas and Tennessee have not been able to see it so, it would have seemed that the Robbins case, looking no further than the foregoing quotations from it, is conclusive of the questions made in this case. The illustration of "Postmaster and United States Marshal" certainly does not savor of a distinction based upon the fact of residence or non residence, and the reference to fundamental principles of Federal control over Inter-State Commerce looks as little to the view that only "*Drummer*" cases are covered by the adjudication.

McDOWELL & McGOWAN,

Henry CRAFT, ~~& CRAFT~~,

For Plaintiffs in Error.

Supreme Court U. S.
FILED.
JAN 3 1889
JAMES H. MCKENNEY,
CLERK.

IN SUPREME COURT OF UNITED STATES

October Term, 1888.

C. L. FICKLEN, et als, Plaintiffs in Error.

VS. } No. 1087.

THE TAXING DISTRICT OF SHELBY COUNTY, TENN., et als, Defendants in Error.

Brief for Defendants in Error.

S. P. WALKER,
Of Counsel for Defendants in Error.

E. Whitmore, Printer, Memphis, Tenn.

Federal question there presented and determined. The Supreme Court of the State delivered no written opinion, but the grounds of its holding are sufficiently apparent from its decree.

Transcript, 15.

It appears by this bill, that all the principals of Ficklen & Co. are residents of other States; and that nine-tenths of the business of Cooper & Co is done for principals of other States. Upon this state of facts it was held by the Chancellor, that Ficklen & Co. were not liable, either for the fixed charge of $50 00, or the 2½ per cent. on commissions; and that Cooper & Co. were liable for the fixed charge of $50.00 and for one-tenth of the 2½ per cent. on commissions. This ruling, based on the doctrine of non-interference with Inter-State Commerce was reversed by the Supreme Court of the State, and the Plaintiffs in Error adjudged liable for the whole tax, as fixed by the Statute.

This Court from the case of

Brown vs. Maryland, 12 *Wheaton* 419.

to the very recent cases of

Robbins vs. The Taxing District, 12 *U. S.* 489.

and

Leloup vs. The Port of Mobile, 127 *U. S.* 640.

has so frequently considered the questions involved, that it is not our purpose to attempt an extended review or discussion of the authorities. We shall only, therefore, as briefly as possible, undertake to show that the tax in question is not a regulation of Inter-State Commerce.

1.—For the year 1887, Plaintiffs paid the $50.00 fixed charge, and gave bond to report their gross commissions at the end of the year. They thereupon received, and throughout the entire year, held a *general unrestricted* license to do busi-

ness as "Commission Brokers." We submit that the question of the *extent* or *character* of the business done under that license has nothing to do with their liability to report the commissions and pay the 2½ per cent. thereon, *as the price of the privilege*. In legal effect, *they bought* the privilege on the terms prescribed by the Statute; and will not be allowed to refuse to pay the price, on the ground that *they actually did* only a restricted kind of brokerage business. They were at liberty—took out licenses, to do any and all kinds of commission business, and their liability to pay the statutory price, cannot be made to depend on the exercise or non-exercise of the privilege.

The tax in question is (as was held by the State Court) a privilege tax, graduated by the amount of commissions received. If as Complaintants contend, they were not taxable, then *they did not need and should not have taken out the license*. Having taken it out, they must pay what they in effect *agreed* to pay for it.

2.—It appears from the bill that Complaintants are, and hold themselves out as general commission brokers, or merchants. For 1887 they took out general licenses as such. For 1888, they applied for the same character of license.

The fact that their principals are non-residents of the State, is an accident of the case—which, though true on the day the bill was filed, might not be true the next day. If, therefore, Plaintiffs are right in their contention, the true method of procedure by them would have been simply to have contented themselves with *private agencies* of given non-resident principals, instead of assuming the role of general "Commission Merchants."

3.—The liability of Cooper & Co. cannot be *apportioned or divided*, on the lines laid down in the ruling of the Chancery Court. If (as was held) they are pursuing a taxable vocation, they must pay the amount fixed by the State.

suing the vocation of a general merchandise broker. In this respect the case is distinguishable from that of

Cook vs. Pennsylvania, 97, *U. S.*, 566.

In that case, the State of Pennsylvania exacted a certain per centage of the proceeds of foreign goods sold at auction, for the privilege of thus selling them; and the tax was held to be a duty on imports, and unconstitutional, under the principles of the leading case of

Brown vs. Maryland, 12, *Wheaton* 490.

In this case the State of Tennessee requires that every person, pursuing the vocation of merchandise broker, shall pay a vocation tax of two and one-half per cent. of the commissions earned. Can the tax be disputed, on the fact that the goods sold were, at the time of the sale, in another State, and, that, as between the principals—buyer and seller—the transaction was one of Inter-State Commerce? Is the State's exaction so directly connected with the Commerce as to make it a burden upon, or a regulation of Inter-State Commerce? We submit that it is not a tax upon the Commerce between the States, but that it is what it purports to be, a tax upon the broker himself, graduated by the amount realized by him from the transaction, and that, except in that indirect and remote way, which this Court has never allowed to affect the validity of State taxation, it has no tendency to prevent or burden the Inter-State Commerce itself.

We do not ignore the fact that this Court in

Phila. Steamship Co. vs. Pennsylvania, 122. *U. S.*, *pp.* 340–342,

has expressed its dissent from so much of the opinion in the case of the *State Tax on Railway Gross Receipts* as held that the tax there in question was valid because it was laid on the gross receipts of the Company after they had been earned and incor-

porated into the general mass of property in the State. The Court said: "If such a tax is laid, and the receipts taxed, are those "derived from transporting goods and passengers in the way of "Inter-State or Foreign Commerce, no matter when the tax "is exacted, whether at the time of realizing the receipts or at "the end of every six months or a year, it is an exaction aimed "at the Commerce itself, and is a burden upon it, and serious-"ly affects it." But would the tax have been held invalid if it had been laid as a privilege tax on a general Ship Broker, soliciting business for that and such other lines as chose to employ him? If so, every cotton broker in the city of Memphis, buying cotton for eastern or foreign correspondents, may successfully deny his liability to a privilege tax; every merchant's clerk in the city of Memphis may deny his liability, wholly or partially, to a vocation tax if the merchant, his employer, is engaged, wholly or partially, in buying goods from or selling them into othar States.

The ultimate question here is of the power of the State to lay a vocation tax on one of its resident citizens, graduated according to the profits realized by him from the pursuit of that vocation. The Plaintiffs ask the Court to go one step beyond any decision yet rendered by it. But we submit that the validity of the tax should be affirmed—that the existence and exercise of such power does tend to embarrass, hamper, or burden Commerce between the States.

S. P. Walker
For defts in error

Supreme Court of the United Stat

OCTOBER TERM, 1891.

CHARLES L. FICKLEN, AND CHARLES COOPER A
EDWARD M. COOPER, PARTNERS UNDER TH
STYLE OF COOPER & CO.,

vs.

THE TAXING DISTRICT OF SHELBY CO., TENN.

IN ERROR TO THE SUPREME COURT OF TENNESSEE.

INTERSTATE COMMERCE.

Brief of W. Hallett Phillips for plaintiffs in error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1891.

FICKLEN ET AL.

vs.

TAXING DISTRICT OF SHELBY CO., TENN.

Brief of W. Hallett Phillips for plaintiffs in error.

As the allegations of the bill must be taken for true on demurrer, it is important to ascertain the facts presented.

The complainants are stated to be commercial agents or merchandise brokers located within the taxing district of Shelby county, where their respective firms rent a room for the purpose of keeping and at times exhibiting their samples and carrying on their correspondence with their respective principals. They use no capital in their business. They handle or deal in no merchandise, and are neither buyers nor sellers. They only engage in negotiating sales for their respective principals. They do precisely the same business that commercial drummers do, the only difference being that they are stationary, while the commercial drummers are transitory and go from place to place and secure a temporary room at each town or city in which to exhibit their samples. Each solicits orders for the sales of the merchandise of their respective principals and forwards the same to

them, when such orders are filled by shipping the goods direct to the purchasers thereof in the county of Shelby.

All of the sales negotiated by complainant Ficklin are exclusively for non-resident firms, who reside and carry on business in other States than Tennessee, and all the merchandise so sold is in other States than Tennessee, where the sales are made, and are shipped into Tennessee, when the orders are forwarded and filled.

At least nine-tenths of the sales negotiated and effected by complainants Cooper & Company and at least nine-tenths of their gross commissions, are derived from merchandise of non-resident firms or persons, and which merchandise is shipped into Tennessee from other States, after the sales are effected.

Section 9, chapter 96, of the Acts of 1881, Tennessee, and made subsection 17 of section 22 of the Taxing District acts, page 40 of the Taxing District Digest, provides:

"Every person or firm dealing in cotton or other article whatever, whether as factors, brokers, buyers or sellers on commission or otherwise, $50 per annum, and in addition every such person or firm shall be taxed ad valorem 10 cents on every $100 of amount of capital invested in such business: *Provided, however*, That if such person or firm carry on the cotton or any other business in connection with the grocery or any other business the capital invested in both shall only be taxed once, but such person or firm must pay a privilege for both occupations: *And provided further*, That if the person taxed in this subsection have no capital invested they shall pay 2½ per cent. on their gross yearly commissions, charges, or compensation for said business, and at the time of taking out their said license they shall give bond to return said gross commissions, charges, or compensation to the trustees at the end of the year, and at the end of the year they shall make returns to said trustees accordingly and pay to them the said 2½ per cent."

The question involved in the case is whether the tax imposed is valid, so far as concerns the interstate business

transacted by the complainants. The question is raised by a bill for an injunction to restrain the Taxing District from levying and collecting the tax or from instituting any proceeding against the complainants. The court of the first instance, held by the chancellor on the 23d of April, 1888, entered its decree in favor of complainants. By this it was determined that the tax sought to be enforced against complainants, in so far as complainants are engaged in selling goods, wares, and mechandise or property by sample and on commission which belongs wholly to non-resident owners, is a burden upon interstate commerce and to that extent in violation of the Constitution of the United States; and it appearing to the court that for the year 1887 complainants paid the sum of $50 each, as required by the statute, and gave bond to report at the end of the year from the date thereof the amount of their commissions upon their business as such "merchandise brokers" done during the year, and complainant Ficklen having reported that his business was wholly interstate commerce, and that the entire tax sought to be collected from him is illegal, it was ordered that as to said Ficklen the injunction be made perpetual.

And it appearing that complainants Cooper & Company reported that nine-tenths of the business done by them was interstate commerce, and one-tenth was for owners residing in Tennessee, it was therefore ordered and decreed that complainants Cooper & Company were legally bound to pay the sum of $50 and the tax of 2½ per cent. on their commissions to the extent that those commissions were upon sales of property owned by residents of Tennessee, and a privilege tax upon their business of merchandise brokerage for the year 1888. It was therefore decreed, that the injunction be also perpetuated as to complainants Cooper & Company on condition that they report the amount of commissions received by them in the fiscal year of 1887 from business for residents of this State, and pay the license tax as aforesaid. (Record, 12.)

This decree was reversed by the supreme court of Tennesssee, where it was adjudged that complainants were liable for the whole amount of the tax, and that irrespective of the nature of the business done; that the act of 1881, as applied, was not violative of that clause of the Constitution by which the power to regulate commerce between the States is conferred upon Congress. It was further adjudged that complainants having applied for and accepted and held during the year 1887, licenses, and having applied for licenses during the year 1888, could not question the validity of the act, whether the business conducted by them was or was not exonerated from tax under the Federal Constitution. The bill was ordered to be dismissed.

As the judgment denied to complainants rights claimed under the Constitution, a case is presented for the review of this Court.

That power of review is in nowise lessened by the further decision that complainants were estopped from setting up their constitutional exemption from State taxation.

An unconstitutional law is no law at all, and the principles of estoppel can never be interposed as an obstacle to showing such unconstitutionality.

It would seem plain that if the law is, as alleged, illegal, there is nothing to prevent the determination of the question.

The decision of this Court on that question cannot be evaded.

An occupation cannot be taxed if, as has frequently been held, the tax is so specialized as to operate as a burden against the introduction and sale of the products of another State or against the citizens of other States. A tax to do business is a tax on the business, to be paid by and out of the business.

Here the operation of the tax is to exact a duty for per-

mission to exercise interstate commerce within the State. It is for the privilege of making contracts within the county of Shelby to sell merchandise, the product of other States, for merchants of such States to residents of Tennessee. It is for the faculty of doing that business, that the license is required.

A law requiring a person to take out a license in order to confer upon him the faculty or privilege of conducting a business is a regulation of that business; and when the law requires the plaintiffs to take out a license in order to acquire the privilege of conducting interstate commerce, that is a regulation of interstate commerce.

Here business between States is conducted by means of agents, called merchandise brokers, and that business cannot be prohibited unless a license is taken from the State in which the agent is located where the business is transacted.

It is the business really which is taxed, and the validity of the tax in nowise depends on the length of time in which the agent or broker was in the State or intended to remain, but upon the character of the business transacted. If the business was interstate it was not subject to any exaction by the State. If a person of the vocation of plaintiffs should come into the State of Tennessee for the sole purpose of getting orders for non-resident merchants for goods the products of other States, we do not suppose it would be claimed that a State would have a right to levy a tax on such person for the privilege. We repeat, does his liability to the tax depend on the length of his stay?

If it does not, then, it seems to us, it must follow that residence of the person doing the business cannot affect the question. It seems to us that the validity of the tax must be determined by the nature of the business taxed and not by the residence of the agent transacting it.

In Walling *vs.* Michigan, the fact that the persons soliciting orders or selling, was located in the State, did not affect

the question of the effect of the tax which was, as held by the Court, a tax for selling goods brought into the State from other States.

116 U. S., 446.

It must be constantly kept in view that the tax is one on the faculty of conducting the business. It will not do to say that the act does not purport to make any regulation or prescribe any rule in the conduct of interstate business. The real inquiry must be, What is the necessary *effect* of the tax?

In the State Freight Tax case this Court say:

"It has repeatedly been held that the constitutionality or unconstitutionality of a State tax is to be determined not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid."

15 Wall., 232.

That the entire business of Ficklin, and almost the entire business of Cooper and Company, constituted interstate commerce, can hardly be denied.

Commerce with foreign nations and among the several States can mean nothing more than intercourse with those nations and among the States for the purposes of trade, be the object of the trade what it may, and this intercourse must include all the means by which it can be carried on.

Corfield *vs.* Coryell, 4 Wash. C. C., 379.

Nor is the tax any less objectionable—the nature of the exaction is not changed—because it does not discriminate in favor of domestic business.

State Freight Tax case.

A review of some of the recent decisions would seem clearly to show that the tax now in question cannot be sustained.

In Leloup *vs.* Mobile (opinion unanimous) it is said:

"We fail to see how a State can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business is a tax on the occupation, and a tax on the occupation of doing a business is surely a tax on the business."

127 U. S., 645.

It was also observed in answer to the claim that the tax was partially levied on internal commerce: "That fact does not remove the difficulty. The tax affects the whole business without discrimination."

The court states certain general propositions as the result of the recent decisions.

"No State has the right to levy a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce or on the receipts derived from that transportation or on the occupation or business of carrying it on, and the reason is such taxation is a burden on that commerce and amounts to a regulation of it, which belongs solely to Congress."

To call the tax in question an occupation tax is only, as Chief Justice Marshall says, to vary the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing.

Brown *vs.* Maryland, 12 Wheat., 419.

The present case falls equally within the reasoning of Pickard *vs.* Tennessee, where it was held that the privilege tax on the running and using of sleeping cars, was a tax on transportation, and hence a restriction on commerce.

Blatchford, J., 117 U. S., 49.

In Robbins' case, which really governs this, the court, in defining the extent of the power of the State, enumerates

"the imposition of taxes upon persons residing within the State or belonging to its population *and upon avocations* and *employments pursued therein not directly connected with foreign or interstate commerce*, or with some other employment or business, exercised under authority of the Constitution and laws of the United States."

The underlying principle in the Robbins case, is that it is not competent for a State to levy a tax or impose any other restriction upon the citizens or inhabitants of other States, for selling or seeking to sell their goods in such State before they are introduced therein.

The court observes that the most general plan resorted to by a merchant in order to sell his goods in other States is to obtain orders from persons residing in those States.

"But how is the merchant or manufacturer to secure such orders? If he may be taxed by such States for doing so, who shall limit the tax? It may amount to prohibition."

The court then proceeds to show that the general way resorted to, is for the merchant to obtain orders by personal application, either by himself or by some one employed by him for that purpose, the ordinary agency being that of drummers or commercial agents; but there is nothing in the decision limiting it to such an agency.

Robbins *vs.* Shelby Co. Taxing District, 120 U. S., 490.

The decision, by its terms and by necessity, covered all agencies, on the ground that the State had no right to make it a State privilege to carry on interstate commerce.

In the nature of things, it cannot be that when the business is conducted by one instrumentality the State cannot tax it; but when the *same* business is conducted by a different agency it is subject to State exaction.

That if the order is solicited by an agent called a drummer, who happens to be temporarily in the State, the State is prohibited to interfere, but that when the order is obtained

by a person called a merchandise agent or broker located in the State, the State may interpose.

In both cases the levy of the tax or the requirement of a license is for making negotiations in the conduct of interstate commerce.

This the State cannot do, and for the reason that the negotiation of sales of goods for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce.

As shown in Phila. S. S. Co. *vs.* Penn., a distinction cannot be drawn between a tax on the business and a tax on what is got for performing it—in other words, receipts.

The minority in the Robbins case held that to all intents and purposes the drummer had his goods with him for sale, and that there was no difference in principle between a tax on a seller by sample and a tax on a peddler who has come with his goods from another State, and expected to go back again.

Fargo *vs.* Michigan presented the case of a tax on the gross receipts of transportation, which was held void.

The Court (Miller, J.) in that case say:

"The proposition that the States can, by way of a tax on business transacted within their limits, regulate such business has often been set up as a defense to the allegation that the taxation was such an interference with commerce as violated the constitutional provision now under consideration. *But when the business so taxed is commerce itself*, and is *commerce among the States* or with foreign nations, the constitutional provision cannot thereby be evaded."

121 U. S., 244.

In Phila. S. S. Co. *vs.* Penn. (122 U. S., 336) a tax on gross receipts of the steamship company was pronounced void. The Court said:

"Their business as carriers in foreign or interstate commerce cannot be taxed by the State under the plea that they are exercising a franchise."

It was also held that—

"The tax could not be regarded as an income tax on the class to which it referred, but a tax on the receipts of a certain character. The corporate franchises, the property, the business, the income of corporations created by a State may undoubtedly be taxed by the State, but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce or any other matter exclusively within the jurisdiction of the Federal Government. This is a principle so often announced by the courts, and especially by this Court, that it may be received as an axiom of our constitutional jurisprudence."

A similar general principle was announced by Justice Field in Welton *vs.* Mo., when he said:

"The general power of the State to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be admitted in subordination to the requirements of the Federal Constitution. Where the business or occupation consists in the sale of goods the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the State to levy, it matters not whether it be raised directly from the goods or indirectly from them through the license to the dealer; but if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license."
91 U. S., 279.

"Ordinary occupations (say the Court in a later case) are taxed in various ways, and in most cases legitimately taxed; but we fail to see how a State can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business is a tax on the occupation, and a tax on the occupation of doing a business is surely a tax on the business."

There the tax was on the business of telegraph companies conducted within the State of Alabama. It was, as in the case of Robbins, an occupation tax. By a unanimous opin-

ion the tax was pronounced void. It was held that the State could not compel the company to take out a license for the transaction of business in the city, and that a general license tax on the telegraph company affected its entire business, interstate as well as internal.

Leloup *vs.* Mobile, 127 U. S., 640.

And so it has been likewise held that a tax "on the gross receipts derived from business done in this State," when levied on a telegraph company, is invalid where the communication by messages is carried either into the State from without or from within the State to another State.

W. U. Telegraph Co. *vs.* Ala., 132 U. S., 477.

The opinion in this case was also unanimous.

The Chief Justice, delivering the opinion of the Court in Lyng *vs.* Michigan, refers to Leisy *vs.* Hardin to show that the power cannot be conceded to a State to exclude, directly or indirectly, the subjects of interstate commerce.

"We have repeatedly held that no State has the right to lay a tax on interstate commerce in *any form*, whether by way of duties laid on the transportation of the subjects of that commerce or on the receipts derived from that transportation or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce and amounts to a regulation of it, which belongs solely to Congress."

135 U. S., 166.

There the State tax was on the business of selling liquors. This Court declared it could not be enforced as against the manufacturers of liquors residing outside the State and so perhaps exclude them from introducing the commodity within the State. The tax was attempted to be levied on the representative of the non-resident manufacturer domiciled within the State.

In Asher *vs.* Texas it was sought to obtain a review of the

Robbins case, but by the unanimous opinion of the Court this was refused. The Court contented itself with a reference to Leloup *vs.* Mobile as a further illustration of the unconstitutionality of local burdens imposed upon interstate commerce by way of taxing an occupation directly concerned therein.

128 U. S., 132.

The same result was reached in Stoutenburgh *vs.* Henneck.

129 U. S., 143.

Neither residence nor citizenship has ever been regarded in any of the cases as a test of the validity of the tax when the question is whether the tax affects interstate commerce. The various corporations deriving franchises from States at whose suit this Court has declared exempt from State taxation as interfering with the commercial power, are proofs of this assertion.

If residence or citizenship was a determining consideration, then citizens of other States would be forced to use alone drummers from their own houses whom they must send into the State where they desire to sell. But they must abandon, perhaps, the more efficient and economical intermediaries who may be domiciled in the State.

But the one is as much an instrument of commerce as the other, and as such free from State regulation.

In McCall *vs.* California the license tax questioned was on railroad agencies.

McCall, the agent, was *resident in California.* His business consisted in soliciting passenger traffic over the interstate railroad which he represented.

It was sought to distinguish the case from that of Robbins.

It was argued that the tax was not upon the business of

the railroad represented, but a license tax for the privilege of maintaining an agency in the city of San Francisco.

But the tax was pronounced void, as the legislation exacted a license fee from a party engaged in interstate commerce, and the tax was on an agency of such commerce.

The Court held that the soliciting agency was one of the means used by the company to increase its interstate traffic.

"The tax upon it, therefore, was a tax upon a means or an occupation of carrying on interstate commerce, pure and simple."

136 U. S., 110.

This case was followed by that of Norfolk Railroad *vs.* Pennsylvania, in which it was held that a State could not exact a license for the privilege of an interstate railroad keeping an office in the State.

136 U. S., 114.

The tax was upon one of the means or instrumentalities of the company's interstate commerce.

A somewhat similar decision is that of Crutcher *vs.* Kentucky, decided at the present term.

There a license was required of agents of every express company before they were authorized to carry on business in the State.

This, the Court held, embraced interstate business, as well as business wholly within the State, and for that reason not within the power of the State.

Mr. Justice Bradley, in one of his latest enunciations of a principle which he has done so much to establish, says:

"If a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other States, it would not be within the province of the State legislation to exact conditions on which they should carry on their business, nor to require them to take out a license therefor. To carry on interstate commerce is not a franchise or a privilege granted by the

Robbins case, but by the unanimous opinion of the Court this was refused. The Court contented itself with a reference to Leloup *vs.* Mobile as a further illustration of the unconstitutionality of local burdens imposed upon interstate commerce by way of taxing an occupation directly concerned therein.

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129 U. S., 143.

Neither residence nor citizenship has ever been regarded in any of the cases as a test of the validity of the tax when the question is whether the tax affects interstate commerce. The various corporations deriving franchises from States at whose suit this Court has declared exempt from State taxation as interfering with the commercial power, are proofs of this assertion.

If residence or citizenship was a determining consideration, then citizens of other States would be forced to use alone drummers from their own houses whom they must send into the State where they desire to sell. But they must abandon, perhaps, the more efficient and economical intermediaries who may be domiciled in the State.

But the one is as much an instrument of commerce as the other, and as such free from State regulation.

In McCall *vs.* California the license tax questioned was on railroad agencies.

McCall, the agent, was *resident in California.* His business consisted in soliciting passenger traffic over the interstate railroad which he represented.

It was sought to distinguish the case from that of Robbins.

It was argued that the tax was not upon the business of

the railroad represented, but a license tax for the privilege of maintaining an agency in the city of San Francisco.

But the tax was pronounced void, as the legislation exacted a license fee from a party engaged in interstate commerce, and the tax was on an agency of such commerce.

The Court held that the soliciting agency was one of the means used by the company to increase its interstate traffic.

"The tax upon it, therefore, was a tax upon a means or an occupation of carrying on interstate commerce, pure and simple."

136 U. S., 110.

This case was followed by that of Norfolk Railroad *vs.* Pennsylvania, in which it was held that a State could not exact a license for the privilege of an interstate railroad keeping an office in the State.

136 U. S., 114.

The tax was upon one of the means or instrumentalities of the company's interstate commerce.

A somewhat similar decision is that of Crutcher *vs.* Kentucky, decided at the present term.

There a license was required of agents of every express company before they were authorized to carry on business in the State.

This, the Court held, embraced interstate business, as well as business wholly within the State, and for that reason not within the power of the State.

Mr. Justice Bradley, in one of his latest enunciations of a principle which he has done so much to establish, says:

"If a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other States, it would not be within the province of the State legislation to exact conditions on which they should carry on their business, nor to require them to take out a license therefor. To carry on interstate commerce is not a franchise or a privilege granted by the

State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States." * * * "We have repeatedly decided that a State law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it."

141 U. S., 57.

We have dwelt thus fully on the late decisions, in order to show that the Court has pursued an undeviating and consistent course of adjudications on the subject.

In most of these decisions the case of Robbins has been selected for citation, as stating the fundamental grounds upon which the Court proceeded.

The frequency of the Court's reference to that opinion shows the importance attached to it and the Court's determination to adhere to it.*

The latest declaration of the Court on the general subject, contained in Maine *vs.* Grand Trunk Railway (decided December 14, 1891), does not affect the immediate question now involved.

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* Robbins *vs.* Shelby Co. Taxing District is cited in the following cases:
120 U. S., 505, Corson *vs.* Maryland.
121 U. S., 247, Fargo *vs.* Michigan.
121 U. S., 447, Packet Co. *vs.* Aiken.
122 U. S., 326, Phila. S. S. Co. *vs.* Pennsylvania.
122 U. S., 356, Telegraph Co. *vs.* Pendleton.
125 U. S., 496, Bowman *vs.* Chicago Railway Co.
127 U. S., 646, Leloup *vs.* Mobile.
128 U. S., 130, Ashur *vs.* Texas.
129 U. S., 148, Stoutenburgh *vs.* Hennick.
135 U. S., 108, Leisy *vs.* Harden.
136 U. S., 108, McCall *vs.* California.
136 U. S., 327, Minnesota *vs.* Barber.
138 U. S., 82, Bremmer *vs.* Rebman.
140 U. S., 554, *In re* Rohrer.
141 U. S., 41, Pullman Car Co. *vs.* Pennsylvania.
141 U. S., 48, Crutcher *vs.* Kentucky.

The tax there in question was an excise tax for the privilege of operating a railroad within the State.

It is true that the amount of such tax was to be ascertained by a reference to the gross receipts; but, as held by the Court, this was merely for the purpose of *ascertaining the value of the business* done by the corporation, and thus obtain a guide as to the amount of the excise which should be levied. There was no levy on the receipts themselves, either in form or fact, say the Court.

If the amount ascertained were specifically imposed, no objection to its validity would be pretended.

The railroad within the State was constructed under the franchise of the State, and it fell under the operation of the following clause of the taxing act:

"When a railroad lies partly within and partly without this State or is operated as part of a line or system extending beyond this State, the tax shall be equal to the same proportion of the gross receipts in this State as herein provided, and its amount determined as follows: The gross transportation receipts of such railroad, line, or system, as the case may be, over its whole extent, within and without the State, shall be divided by the total number of miles operated to obtain the average gross receipts per mile, and the gross receipts in this State shall be taken to be the average gross receipts per mile, multiplied by the number of miles operated within this State."

The tax was upheld as an excise tax on the corporation for exercising its franchise within the State of Maine:

"As the granting of the privilege rests entirely in the discretion of the State, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the State, in its judgment, may deem most conducive to its interest or policy. It may require the payment into its treasury each year of a specific sum or it may proportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts for the present or past years. The character of the tax or its validity is not determined by the mode adopted in fixing its amount for any specific period or the times of its payment."

The Court argues that its decision does not conflict with the case of Philadelphia Steamship Co., Penn., because there the tax was in terms on the gross receipts of a steamship company derived from interstate commerce.

That case the Court adheres to and holds the views there announced not qualified or impaired by the later decision.

A minority of four justices dissented on the ground that even under the limitations of the opinion, the tax amounted to a regulation of commerce inhibited by the Federal Constitution.

That, while the purpose of the law professed to be to lay a tax upon the foreign company for the privilege of exercising its franchise in the State of Maine, the *mode* of doing this was unconstitutional, as it consisted in reality in a tax on the gross receipts of the company derived from foreign and interstate business.

We think we are safe in stating that the case now submitted falls within that of Robbins *vs.* Shelby, as approved in the subsequent decisions.

The only substantial distinction between the Robbins case and the one now presented is to the advantage of the latter.

In the Robbins case there was only a fixed license tax involved. In the present case we have the additional element of a tax on the gross proceeds of the interstate business.

It is true that in the Robbins case the agency was transitory, while in the present case it is stationary, within the taxing State.

This latter difference in the facts, we confidently submit, can make no difference in the principle involved.

The judgment of the supreme court of Tennessee should be reversed.

W. Hallett Phillips,
For Plaintiffs in Error.

Office Supreme Court U.
FILED.
MAR 16 1892
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1891.

C. L. FICKLEN ET ALS., Plaintiffs in Error,

vs. } No. 97

THE TAXING DISTRICT OF SHELBY COUNTY, TENN., ET ALS, Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

S. P. WALKER,
Of Counsel for Defendants in Error.

S. C. TOOF & CO., PRS. & LITHS., MEMPHIS.

Supreme Court of the United States.

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C. L. FICKLEN ET ALS., Plaintiffs in Error,

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THE TAXING DISTRICT OF SHELBY COUNTY, TENN., ET ALS, Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

This case is here on writ of error to the Supreme Court of Tennessee, and involves the validity of a vocation or privilege tax claimed of the plaintiffs in error by the Taxing District.

The plaintiffs in error filed an injunction bill in the State Court of Chancery, in which they sought to enjoin the collection of the tax, upon the ground that it was repugnant to certain provisions of the Constitution of the State, and also upon the ground that it was in violation of sec. 9, Art. 1, of the Constitution of the United States, by which the power to regulate commerce between the States is committed to the Congress of the United States. Of course the decision of the State court is open to review here, only so far as concerns the Federal question there presented and determined. The Supreme Court of the State delivered no written opinion, but the grounds of its holding are sufficiently apparent from its decree.

Transcript 15.

It appears by the bill that all the principals of Ficklen & Co. are residents of other States; and that nine-tenths of the business of Cooper & Co. is done for principals of other States. Upon this state of facts it was held by the chancellor that Ficklen & Co. were not liable, either for the fixed charge of $50, or the 2½ per cent. on commissions; and that Cooper & Co. were liable for the fixed charge of $50 and for one-tenth of the 2½ per cent. on commissions. This ruling, based on the doctrine of non-interference with interstate commerce, was reversed by the Supreme Court of the state, and the plaintiffs in error adjudged liable for the whole tax, as fixed by the statute.

This court from the case of

Brown v. Maryland, 12 Wheat 419,

to the very recent cases of

Robbins v. The Taxing District, 120 U. S. 489,
Leloup v. The Port of Mobile, 127 U. S. 640, and
Crutcher v. Kentucky, 141 U. S. 47,

has so frequently considered the question involved, that it is not our purpose to attempt an extended review or discussion of the authorities. We shall only, therefore, as briefly as possible, undertake to show that the tax in question is not a regulation of Interstate Commerce.

1. For the year 1887 plaintiffs paid the $50 fixed charge and gave bond to report their gross commissions at the end of the year. They thereupon received, and throughout the entire year held, a *general unrestricted* license to do business as "merchandise brokers." (Transcript 9.) We submit that the question of the *extent* or *character* of the business done under that license has nothing to do with their liability to report the commissions and pay the 2½ per cent. thereon *as the price of the privilege.* In legal effect *they bought* the privilege on the terms prescribed by the statute, and will not be allowed to refuse to pay the

price on the ground that *they actually did* only a restricted kind of brokerage business. They were at liberty—took out licenses—to do any and all kinds of commission business, and their liability to pay the statutory price cannot be made to depend on the exercise or non-exercise of the privilege.

The tax in question is (as was held by the State court) a privilege tax, graduated by the amount of commissions received. If, as complainants contend, they were not taxable, then *they did not need and should not have taken out the license.* Having taken it out they must pay what they in effect *agreed* to pay for it.

2. It appears from the bill that complainants are, and hold themselves out as, general merchandise brokers. For 1887 they took out license as such. For 1888 they applied for the same character of license.

The fact that their principals are non-residents of the State is a fact which, though true on the day the bill was filed, might not be true the next day. If, therefore, plaintiffs are right in their contention, the true method of procedure by them would have been simply to have contented themselves with *private agencies* of given non-resident principals, instead of assuming the role of general "commission merchants."

3. The case is not within the principles of the opinion in Robbins v. the Taxing District, 120 U. S. 489.

(*a.*) Robbins was the representative of *one* non-resident firm, and the case was treated as if his principals had come into the State to make sales, and the State had undertaken to seize and tax them.

(*b.*) The tax was held to be in effect not a tax on Robbins, but on his principals. Here the reverse is clearly true.

Whilst it was held in the Robbins case that a State "cannot impose taxes on persons passing through the State, "or coming into it merely for a temporary purpose, especially if connected with Interstate or Foreign Commerce," (pp. 493–4); yet it was also held that "the imposition of taxes upon persons residing within the State, "or belonging to its population, and upon avocations and "employments pursued therein, not *directly* connected with "foreign or interstate commerce," (p. 493), was not forbidden. On page 495 it is assumed that a merchant opening a house or place of business in another State would be subject to taxation by that State. And on page 495 the court said:

"To say that the tax, if invalid against drummers from "other States, operates as a discrimination against the "drummers of Tennessee, *against whom it is conceded to be* "*valid*, is no argument; because the State is not bound to "tax its own drummers; and if it does so whilst having "no power to tax those of other States, it acts of its "own free will, and is itself the author of such discrimination. As before said, the State may tax its own internal "commerce; but that does not give it any right to tax "interstate commerce."

The case is distinguishable from that of

Cook v. Pennsylvania, 97 U. S. 566.

In that case, the State of Pennsylvania exacted a certain percentage of the *proceeds* of foreign goods sold at auction, for the privilege of thus selling them; and the tax was held to be a duty on imports, and unconstitutional, under the principles of the leading case of

Brown v. Maryland, 12 Wheaton 490.

In this case the State of Tennessee requires that every person pursuing the vocation of merchandise broker, shall pay a vocation tax of two and one-half per cent. of the commissions earned. Can the tax be disputed, on the fact

that the goods sold were, at the time of the sale, in another State, and that, as between the principals—buyer and seller—the transaction was one of interstate commerce? Is the State's exaction so directly connected with the commerce as to make it a burden upon or a regulation of interstate commerce? We submit that it is not a tax upon the commerce between the States, but that it is what it purports to be—a tax upon the broker himself, graduated by the amount realized by him from the transaction, and that, except in that "direct and remote way, which this court has never allowed to affect the validity of State taxation, it has no tendency to prevent or burden the Interstate Commerce itself

The ultimate question being whether or not the power of the State to lay a vocation tax on one of its resident citizens, graduated according to the profits realized by him from the pursuit of that vocation, can be denied on the ground that the citizen is engaged, wholly or partially, in negotiating sales between resident and non-resident merchants of goods situated in another State, we will examine such of the decisions of this court as seem to bear most pertinently on the question, without in the least attempting an exhaustive citation or analysis of all the cases arising under the interstate commerce clause of the Constitution.

This court has often ruled that the State has power to tax all property having a *situs* within its limits, and that property employed in interstate commerce is not on that account withdrawn from the power to tax. There must not, however, be any discrimination against such property because it is so used, nor against property brought from other States or countries because of that fact.

"The property of corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to taxation,

provided always it be within the jurisdiction of the State."
Gloucester F. Co. v. Pennsylvania, 114 U. S. 206.

"The cars of this company, within the State of Pennsylvania, are employed in interstate commerce; but their being so employed does not exempt them from taxation by the State; and the State has not taxed them *because of their being so employed*, but because of their being within its territory and jurisdiction."
Pullman Car Co. v. Pennsylvania, 141 U. S.

That case, as did that of Pullman Co. v. Twombly, 29 Fed. Rep. 658, in its last analysis, turned upon the question of the property having a *situs* within the State seeking to tax it; and the question was determined upon the general principles of law applicable thereto.

The same proposition is announced in
Mayer v. B. & O. R. R. Co., 127 U. S. 117.

And in many others of the decisions of this court it is held that the State has power "to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in the like way by its own citizens"; and that "the mere fact that they (the cars, etc.) are used as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid."
Ibid, page 124.

In the case of Woodruff v. Parham, 8 Wall. 137, this court, Miller, J., delivering the opinion, said:

"The merchant of Chicago who buys his goods in New York and sells at wholesale in the original packages, may have his millions employed in trade for half a lifetime and escape all State, county and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York. Neither the State nor the

city which protects his life and property can make him contribute a dollar to support its government, improve its thoroughfares or educate its children. The merchant in a town in Massachusetts who deals only in wholesale, if he purchase his goods in New York, is exempt from taxation. If his neighbor purchase in Boston he must pay all the taxes which Massachusetts levies with equal justice on the property of all its citizens.

"These cases are mentioned as illustrations. But it is obvious that if articles brought from one State into another are exempt from taxation, even under the limited circumstances laid down in *Brown v. Maryland*, the grossest injustice must prevail, and equality of public burdens in all our large cities is impossible."

Conceding that this case is not in harmony with later utterances of the court upon the exact point decided, the language above quoted is fully supported by such cases, so far as concern the general proposition that the States have full power of taxation over all property within their limits, subject only to the qualifications already shown. The *subjects of commerce* are not exempt from State taxation, provided they be not taxed *as such*—taxed in such manner as that the burden is unequal because of the use to which they are put.

Advancing from the question of the power to tax property to that of taxing vocations, business, franchises, we first notice the case of

Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365.

In that case the municipality imposed an annual license fee of $100 on the ferry company, whose boats plied between East St. Louis and St. Louis. The company was chartered by the State of Illinois and domiciled in East St. Louis, the case differing in that respect from the case of *Gloucester Ferry Co. v. Pennsylvania*, 114 *U. S.* 196. The court said:

"The exaction of a license fee is an ordinary exercise of the police power by municipal corporations. When, therefore, a State expressly grants to an incorporated city, as in this case, the power to license, tax and regulate ferries, the latter may impose a license tax on the keepers of the ferries, although their boats ply between landings lying in two different States, and the act by which this exaction is authorized will not be held to be a regulation of commerce."

The cases of

Asher v. Texas, 128 U. S. 129., and

Stoutenberg v. Hennick, 129 U. S. 143,

were identical, in all essential particulars, with that of *Robbins v. The Taxing District.*

In the case of

McCall v. California, 136 U. S. 104,

the tax was, "for every railroad agency, $25 per quarter." McCall became personally involved merely by reason of his representation of the railroad company, and the effort to enforce the tax against him personally by fine and imprisonment.

In commenting upon the case of Smith v. Alabama, 124 U. S. 465, the court said: "We (there) held, however, that the statute (there) in question (imposing a license tax on locomotive engineers) was not in its nature a regulation of commerce; that so far as it affected commercial transactions among the States *its effect was so indirect, incidental and remote* as not to burden or impede such commerce, and that it was not therefore in conflict with the Constitution of the United States or any law of Congress." (Page 113.)

The California tax on the railroad agency, an agency that was instituted "to increase, and (that) doubtless did increase, its interstate passenger traffic," was held invalid,

for the reason that "according to the principles established by the decisions of this court (it was) a tax upon a means or an occupation of carrying on interstate commerce, pure and simple." Page 109.

Perhaps the doctrine of the State's power to tax and its proper limits are found best stated in

Philadelphia S. Co. v. Pennsylvania, 122 U. S. 342.

This court there said:

"The tax in the present case is laid upon the gross receipts for transportation *as such*. Those receipts are followed and caused to be accounted for by the company, dollar for dollar. It is those specific receipts, or the amount thereof (which is the same thing), for which the company is called upon to pay the tax. They are taxed, not only because they are money, or its value, but *because they were received for transportation*."

No doubt a ship-owner, like any other citizen, may be personally taxed for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce, or banking, or any other employment. But that is an entirely different thing from laying a special tax upon his receipts in a particular employment. If such a tax is laid, and the receipts taxed are those derived from transporting goods and passengers in the way of interstate or foreign commerce, no matter when the tax is exacted, whether at the time of realizing the receipts, or at the end of every six months or a year, it is an exaction aimed at the commerce itself, and is a burden upon it and seriously affects it. A review of the question convinces us that the first ground on which the decision in *State Tax on Railway Gross Receipts* was placed is not tenable; that it is not supported by anything decided in *Brown v. Maryland;* but, on the contrary, that the reasoning in that case is decidedly against it.

The second ground on which the decision referred to was based was that the tax was upon the franchise of the cor-

poration granted to it by the State. We do not think that this can be affirmed in the present case. It certainly could not have been intended as a tax on the corporate franchise, because by the terms of the act it was laid equally on the corporations of other States doing business in Pennsylvania. If intended as a tax on the franchise of doing business, which in this case is the business of transportation in carrying on interstate or foreign commerce, it would clearly be unconstitutional. * * * Interstate commerce, when carried on by corporations, is entitled to the same protection against State exactions which is given to such commerce when carried on by individuals."

Phila. S. Co. v. Penn., 122 U. S. 342.

And on page 345 it was said:

"The corporate franchises, the property, the business, *the income* of corporations created by a State may undoubtedly be taxed by the State; but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal Government."

In accord with the distinctions here laid down, this court, in the case of *Maine v. Grand Trunk Railway* not yet reported, sustained a statute of the State of Maine as being a valid tax upon the corporate franchise—the law imposing a tax on the franchise according to the amount of the gross receipts in the State, such amount to be ascertained by dividing the total gross receipts by the total number of miles operated, and multiplying that amount by the number of miles operated in the State.

Tested by the decisions of this court, is the State tax here in question void? It is not a tax on the non-resident merchant, through the resident broker. It is not a tax on the goods, or on the proceeds of the goods sold. It is an occupation or privilege tax, exacted of a resident citizen

pursuing the vocation of a general merchandise broker, graduated in amount by the value of the business transacted; or it may be considered in the light simply of an income tax on the resident citizen. The plaintiff is not specially the representative or accredited agent of any one non-resident merchant or manufacturer. He has a regular office, holds himself out as a general broker, and, in his line of business, is ready to serve all comers.

Would the tax in question in the case of McCall v. California, *supra*, have been held invalid if it had been laid as a privilege tax on a general solicitor, resident in San Francisco, and soliciting business for that and such other lines as chose to employ him? Does the fact that the state exacts of the broker 2½ per cent. of his commissions put any burden or condition upon the transaction of interstate commerce, so as in the least to affect it? Would the volume of commerce be any the more or less because of the existence or non-existence of the tax? We submit that the judgment of the State court should be affirmed on the principles of the last utterance of this court upon this subject, as contained in *Maine v. Grand Trunk Railway*. It being settled that a tax on the corporate franchise of a railroad company engaged in interstate commerce may be taxed according to the value of the business done in the State, it would seem more certainly true that the citizen cannot escape payment of his share of the burdens of municipal government upon the grounds appearing in this record.

J. P. Walker
For defts. in error.